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Hong Leong Bank Bhd v Clotilda Koh (F) (in her capacity as the administratix of the estate of Edward Ngui, deceased)

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24L-72(7) OF 2012
RHODZARIAH BUJANG J
8 APRIL 2013

Contract — Capacity — Liability of — Granting of mortgage of loan facility to mortgagee — Mortgagee passed away — Widow became administratrix of estate — Default in payment of loan — Issuance of statutory notice under s 148 of the Sarawak Land Code (Cap 81) — Notice of demand by bank to demand outstanding sum — Filing of originating summons by bank to sell charged land — Order for sale granted — Whether court handicapped from granting order for plaintiff

By an order dated 27 July 2004, the plaintiff was vested with all the assets and liabilities of Hong Leong Finance. In 1986, Kailan Construction Sdn Bhd ('Kailan') was granted a mortgage loan facility by Sim Lin Finance for RM500,000 with a third party first legal charge on the property of one Edward Ngui as one of the securities for the loan. Edward Ngui passed away and the defendant, his widow, was made an administratrix of his estate. Kailan defaulted in the payment of the loan and judgment was obtained against Kailan and its guarantors. A statutory notice under s 148 of the Sarawak Land Code was also issued by Sim Lin Finance to Edward Ngui about a year before the judgment was obtained and like Kailan, he too did not satisfy the demand of the notice issued to him. In 2012, the plaintiff bank issued a notice of demand against the defendant, demanding the sum outstanding under the loan facility which was RM2,250,827.52. The plaintiff bank then filed an originating summons action against the defendant to, inter alia, sell the charged property. The plaintiff had filed an originating summons to sell the charged land in 1988, ('the first originating summons') and an order for sale was granted. The defendant was also substituted in 1994 as a party in that first originating summons action in her capacity as administratrix of her husband's estate. Even before she was made a party, directions for sale and an auction date for the property were given — all in 1989 but which was postponed when the parties were trying to settle the case. Despite the order for sale, a second notice of appointment to hear originating summons was filed in 1996 and the defendant filed an affidavit in opposition to it. That notice of appointment to hear originating summons was subsequently struck out on in 1996. In contending that it was the notice of appointment to hear originating summons that was struck out, the plaintiff exhibited the endorsement on the court's file where this was indicated. The compelling evidence was not the said endorsement but the

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sealed order of the court. Despite the originating summons being struck out, the plaintiff proceeded to file a summons for direction which the defendant applied to strike out. The plaintiff filed an affidavit in opposition. The summons for direction was withdrawn in1999 and another summons for direction was filed on in 2004 and followed by yet another application to strike it out. By consent, the trial judge ordered that summons for direction to be struck out and further ordered that the plaintiff be barred from proceeding with the sale of the parcel of land. The plaintiff filed a fresh originating summons ('the second originating summons') in 2006 which was objected to by the defendant in her affidavit in opposition filed and after a flurry of exchange of affidavits, the originating summons was finally heard and decided in 2007 who ordered it to be struck out. And now, after a lapse of about five years, this originating summons is filed.

Held, allowing the order in part:

(1) The plaintiff itself was not sure of its rights and the liability of the defendant in place of the deceased chargor. All the documentary evidence pointed clearly to the capacities of the parties and there was no need to see the need for all the declarations respecting the same but the declaratory prayer on the amount outstanding was a different matter altogether (see para 20).

(2) When this originating summons was filed in July 2012, the Rules applicable was O 83 of the Rules of the High Court 1980 ('the RHC'). With effect from 1 August, 2012, the Rules of Court 2012 applied. In the affidavit in support of the originating summons, the plaintiff clearly deposed the particulars required by O 83 r 3(6) and (7) of the RHC such as the amount of advance, repayments, interest, installments in arrears and the amount remaining due but the period in which these were calculated was from 22 May 2012–20 July 2012, which date corresponded to the notice dated 26 April 2012 in which the defendant was demanded to pay the amount outstanding within seven days from the date of the demand. Subsequently, at the two previous dates of hearing of the originating summons fixed after the Rules of Court 2012 came into effect, the plaintiff filed affidavits showing the amount outstanding as at the date of hearing as required by O 83 r 3(3) read with r 3(6) of the new Rules. The declaratory prayer respecting the amount owing as at 20 July 2012 and the interest was actually superfluous since the requirements of the new Rules had been complied with. The court needed only pay heed to that new Rule as it was clearly stated in it, which was O 94 r 3(2) (see para 21).

(3) No affidavit was filed to show the amount outstanding as at 4 February 2012 when the originating summons was finally heard by the present court but that should not handicap the court from granting the order for

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the plaintiff because the court could still make the order for sale subject to the filing of that affidavit (see para 22).

[Bahasa Malaysia summary

Melalui perintah bertarikh 27 Julai 2004, plaintif telah diberikan kesemua aset dan liabiliti Hong Leong Finance. Pada 1986, Kailan Construction Sdn Bhd ('Kailan') telah diberikan kemudahan pinjaman gadai janji oleh Sim Lin Finance sejumlah RM500,000 dengan caj perundangan pihak ketiga ke atas hartanah Edward Ngui sebagai salah seorang pencagar untuk pinjaman itu. Edward Ngui telah meninggal dunia dan defendan, jandanya, telah dijadikan pentadbir harta pusakanya. Kailan telah gagal membuat bayaran pinjaman dan penghakiman telah diperoleh terhadap Kailan dan penjamin-penjaminnya. Notis statutori di bawah s 148 Kanun Tanah Sarawak juga dikeluarkan oleh Sim Lin Finance kepada Edward Ngui lebih kurang setahun sebelum penghakiman diperoleh dan seperti Kailan, dia juga tidak memenuhi tuntutan notis yang telah dikeluarkan kepadanya. Pada 2012, plaintif bank telah mengeluarkan notis tuntutan terhadap defendan, menuntut baki jumlah di bawah kemudahan pinjaman iaitu RM2,250,827.52. Plaintif bank kemudian telah memfailkan tindakan saman pemula terhadap defendan untuk, antara lain, menjual hartanah yang dicagarkan. Plaintif telah memfailkan saman pemula untuk menjual tanah yang dicagarkan pada 1988 ('saman pemula pertama'), dan perintah untuk jualan telah diberikan. Defendan juga telah digantikan pada 1994 sebagai satu pihak dalam tindakan saman pemula pertama tersebut dalam kapasitinya sebagai pentadbir harta pusaka suaminya. Malah sebelum dia dijadikan satu pihak, arahan-arahan untuk jualan dan tarikh lelong untuk hartanah tersebut telah diberikan — semua dalam tahun 1989 tetapi telah ditangguhkan apabila pihak-pihak cuba menyelesaikan kes. Walaupun terdapat perintah jualan, notis pelantikan kedua untuk mendengar saman pemula telah difailkan pada 1996 dan defendan telah memfailkan afidavit membantahnya. Notis pelantikan tersebut untuk mendengar saman pemula kemudian telah dibatalkan pada 1996. Dalam menghujahkan bahawa ia adalah notis pelantikan untuk mendengar saman pemula yang telah dibatalkan, plaintif telah mengekshibitkan pengendorsan pada fail mahkamah di mana ditunjukkannya. Keterangan yang menarik bukanlah pengendorsan tersebut tetapi perintah mahkamah yang dimeteraikan. Walaupun saman pemula telah dibatalkan, plaintif masih meneruskan untuk memfailkan saman untuk arahan yang mana defendan telah memohon untuk dibatalkan. Plaintif telah memfailkan afidavit bantahan. Saman untuk arahan telah ditarik balik pada 1999 dan satu lagi saman untuk arahan telah difailkan pada 2004 dan diikuti dengan satu lagi permohonan untuk membatalkannya. Melalui persetujuan, hakim bicara telah memerintahkan agar saman untuk arahan dibatalkan dan selanjutnya memerintahkan agar plaintif dihalang daripada meneruskan dengan jualan bidang tanah itu. Plaintif telah memfailkan saman pemula baru ('saman pemula kedua') pada 2006 yang telah dibantah oleh defendan dalam afidavit bantahannya yang difailkan dan selepas pertukaran

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beberapa afidavit, salam pemula itu akhirnya didengar dan diputuskan pada 2007 yang mana ia diperintahkan untuk dibatalkan. Sekarang ini, selepas lebih kurang lima tahun, saman pemula ini telah difailkan.

Diputuskan, membenarkan sebahagian daripada perintah:

(1) Plaintif sendiri tidak pasti berhubung haknya dan liabiliti defendan bagi menggantikan penggadai si mati. Kesemua keterangan dokumentar jelas menunjukkan kemampuan pihak-pihak dan tiada keperluan untuk kesemua deklarasi berkenaan yang sama tetapi permohonan deklarasi berhubung jumlah baki adalah perkara yang berbeza (lihat perenggan 20).

(2) Apabila saman pemula ini difailkan pada Julai 2012, Kaedah-Kaedah yang terpakai adalah A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), berkuat kuasa daripada 1 Ogos 2012, Kaedah-Kaedah Mahkamah 2012 adalah terpakai. Dalam afidavit sokongan saman pemula itu, plaintif jelas mendeposkan butiran-butiran yang dikehendaki oleh A 83 k 3(6) dan (7) KMT seperti jumlah pendahuluan, bayaran balik, faedah, ansuran tunggakan dan jumlah baki yang kena dibayar tetapi tempoh yang berikut dikira dari 22 Mei 2012–20 Julai 2012, yang mana tarikh sesuai dengan notis bertarikh 26 April 2012 di mana defendan diminta untuk membayar baki jumlah itu dalam tempoh tujuh hari dari tarikh tuntutan itu. Berikutan itu pada dua tarikh perbicaraan terdahulu berhubung perbicaraan saman pemula ditetapkan setelah Kaedah-Kaedah Mahkamah 2012 berkuat kuasa, plaintif telah memfailkan afidavit-afidavit menunjukkan baki jumlah sepertimana tarikh perbicaraan sebagaimana dikehendaki oleh A 83 k 3(3) dibaca dengan k 3(6) Kaedah-Kaedah baru itu. Permohonan deklarasi berhubung jumlah yang kena dibayar sehingga 20 Julai 2012 dan faedah sebenarnya diperlukan oleh kerana keperluan Kaedah-Kaedah baru telah dipatuhi. Mahkamah hanya perlu memberi perhatian kepada Kaedah-Kaedah baru tersebut kerana ia jelas dinyatakan dalamnya, iaitu A 94 k 3(2) (lihat perenggan 21).

(3) Tiada afidavit telah difailkan untuk menunjukkan jumlah baki sehingga 4 Februari 2012 apabila saman pemula itu akhirnya didengar oleh mahkamah ini tetapi ini tidak patut menghalang mahkamah daripada memberikan perintah kepada plaintif kerana mahkamah masih boleh membuat perintah untuk jualan tertakluk kepada pemfailan afidavit tersebut (lihat perenggan 22).]

Notes

For a case liability of, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3750.

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Cases referred to

EON Bank Bhd v Edwina Lau [2006] MLJU 19; [2006] 5 CLJ 583, HC (refd)
Hamit bin Matusin & Ors v Penguasa Tanah Dan Survei & Anor and another appeal [2006] 3 MLJ 289; [2006] 2 CLJ 251, CA (refd)
Lee Hui Jian (F) v Public Bank Berhad [2007] MLJU 46, HC (refd)
Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257, SC (refd)
Othman & Anor v Mek [1972] 2 MLJ 158; [1972] 1 LNS 103, FC (refd)
Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd [2009] 3 MLJ 745; [2009] 2 CLJ 630, FC (refd)
Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn Bhd v ASM Development Sdn Bhd (formerly known as Sobena Maju Sdn Bhd) [2003] 4 MLJ 633; [2003] 4 CLJ 213, FC (refd)
Tolley v Morris [1979] 2 All ER 561, HL (refd)
United Malayan Banking Corporation Berhad v Hassim bin Haji Ladis & Anor [2001] MLJU 495; [2001] 8 CLJ 775, HC (refd)
VRKRS Chettiappah Chetty v Raja Abdul Rashied Ibni Almarhum Sultan Idris [1933] 2 MLJ 18 (refd)

Legislation referred to

Banking and Finance Institution Act 1989 s 50(1), (3)
Sarawak Land Code (Cap 81) s 148
Sarawak Limitation Ordinance (Cap 49) Items 97, 114, 115
Rules of Court 2012 O 83 r 3(3), (6), O 94 r 3(2)
Rules of the High Court 1980 O 83 r 3(6), (7)

Victor Ng (Tang & Partners) for the plaintiff.
KC Wong (KC Wong & Assoc) for the defendant.

Rhodzariah Bujang J:

RULING

[1] The plaintiff bank, Hong Leong Bank Bhd was by an order dated 27 July 2004 vested with all the assets and liabilities of Hong Leong Finance who acquired them from another company, Visia Finance Bhd and who in turn inherited the same from Sim Lin Finance, all also by way of similar vesting orders by the High Court in Kuala Lumpur.

[2] Way back on 30 August 1986, a company Kailan Construction Sdn Bhd ('Kailan') was granted a mortgage loan facility by Sim Lin Finance for RM500,000 with a third party first legal charge on the property of one Edward Ngui as one of the securities for the loan. Edward Ngui passed away on 9 December 1989 and the defendant, his widow, was made an administratrix of his estate vide a letter of administration dated 7 February 1990. Kailan

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defaulted in the payment of the loan and judgment was obtained against Kailan and its guarantors on 15 August 1989. A statutory notice under s 148 of the Sarawak Land Code was also issued by Sim Lin Finance to Edward Ngui about a year before the judgment was obtained and like Kailan, he too did not satisfy the demand of the notice issued to him.

[3] In more recent time, the plaintiff bank instructed their solicitor to issue a notice of demand against the defendant, which they did on 26 April 2012, demanding the sum outstanding under the loan facility which as at 22 May 2012 stood at RM2,250,827.52 and this was followed, on 14 June 2012, with again a statutory notice under s 148 of the Land Code. Pursuant to the said notice, the plaintiff bank now has filed an originating summons action against the said defendant to, inter alia, sell the charged property.

[4] The defendant has opposed the application and in her affidavit in opposition, I obtained a clearer picture of the long and chequered history of this litigation which was not disclosed in the affidavit in support of the plaintiff filed with the originating summons, the summary of which I had reproduced above. The pertinent facts which was omitted by them is this: The plaintiff in fact had filed an originating summons to sell the charged land on 30 December 1988 ('the first originating summons') and an order for sale was granted on 29 May 1989. Following this disclosure, the plaintiff filed an affidavit in reply giving more details on the history of the litigation and what I can piece together from the documents exhibited by them are these.

LITIGATION HISTORY

[5] Firstly, the defendant who was represented by a different advocate at that material time was also substituted in 1994 as a party in that first originating summons action in her capacity as administratrix of her husband's estate. Even before she was made a party, directions for sale and an auction date for the property were given — all in 1989 but which was postponed when the parties were trying to settle the case.

[6] Secondly, despite the order for sale, a second notice of appointment to hear originating summons was filed in *1996* and the defendant filed an affidavit in opposition to it. That notice of appointment to hear originating summons was subsequently struck out on *7 November 1996* by the then High Court judge, Tuan Hj Muhamad Kamil bin Awang J, said the plaintiff, but the defendant has exhibited a sealed order made by Tuan Hj Muhamad Kamil bin Awang J, dated 7 November 1996 in which His Lordship *ordered the originating summons*, not the notice of appointment to hear originating summons to be struck out, with costs to the defendant. In contending that it was the notice of appointment to hear originating summons that was struck out, the plaintiff

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exhibited the endorsement on the court's file where this was indicated. Needless to say the compelling evidence is not the said endorsement but the sealed order of the court which the defendant has exhibited.

[7] Continuing with the narrative, despite the originating summons being struck out, the plaintiff proceeded, on 27 February 1997 to file a summons for direction which the defendant applied to strike out. The plaintiff filed an affidavit in opposition on 23 September 1997. That summons for direction was withdrawn on 10 July 1999. Another summons for direction was filed on 7 May 2004 and followed by yet another application to strike it out. By consent, on *22 September 2004* Puan Lau Bee Lan J, ordered that summons for direction to be struck out and further ordered that the plaintiff be barred from proceeding with the sale of the parcel of land *pursuant to the order for sale made on 7 November 1996*.

[8] Thirdly, and perhaps in view of that prohibition by the court, the plaintiff filed a fresh originating summons ('the second originating summons') on 15 August 2006 which was objected to by the defendant in her affidavit in opposition filed and after a flurry of exchange of affidavits, the originating summons was finally heard and decided by Hamid Sultan bin Abu Backer JC, (as His Lordship then was) on 1 October 2007 who ordered it to be struck out. And now, after a lapse of about five years, this originating summons is filed.

NOT AN ACTION

[9] This originating summons is not an action, said Mr Victor Ng, the plaintiff's present counsel. Citing, inter alia, *VRKRS Chettiappah Chetty v Raja Abdul Rashied Ibni Almarhum Sultan Idris* [1933] 2 MLJ 18, he submitted, as was held in the said case, that a chargee does not sue the chargor for a debt but applies for leave to exercise his statutory rights as one. The order for sale made by the court is not a decree and citing *EON Bank Bhd v Edwina Lau* [2006] MLJU 19; [2006] 5 CLJ 583, he further submitted that such an order does not amount to a final judgment (see also the Supreme Court case of *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257). Not being a final judgment means that the doctrine of res judicata does not apply to charge action, held the court in the *EON Bank*'s case. In the same case, it was held that a chargee's right to enforce his right under the Land Code has a life span of 60 years under Item 115 of the Sarawak Limitation Ordinance (Cap 49).

[10] In relation to this case, both Items 114 and 115 of the Ordinance apply because the plaintiff in this originating summons not only apply to sell the charged land but also for possession of the land upon a successful sale thereof. Both the said items read as follows:

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1st Column	2nd Column Description of Suit	3rd Column Period of Limitation	4th Column Time from which period begins to run.
114.	By a mortgagee or chargee for fore-closure or sale.	Sixty years	When the money secured by the mortgage or chargee becomes due.
115.	Against a mortgagee or chargee to redeem or to recover possession of immovable property mortgaged or charged ...	Sixty years	When the right to redeem or to recover possession accrues.

[11] Mr Victor Ng's further argument in support of his contention that res judicata does not apply in this case is that the claim here is made in rem, not in personam, citing the Federal Court's decision in *Othman & Anor v Mek* [1972] 2 MLJ 158; [1972] 1 LNS 103 as authority for his proposition. He also referred to another Federal Court case of *Pembinaan Dan Pemaju Mahajiwa (Selangor) Sdn Bhd v ASM Development Sdn Bhd (formerly known as Sobena Maju Sdn Bhd)* [2003] 4 MLJ 633; [2003] 4 CLJ 213 in which the court quoted with approval what was said by Lord Keith of Kinkel in *Tolley v Morris* [1979] 2 All ER 561 at p 572 where His Lordship said as follows:

> It is, however, the general rule that, provided no estoppel arises by reason of res judicata or other wise and his conduct is not vexatious or an abuse of the process of the court, a plaintiff is entitled to bring successive actions founded on the same right of action until such time as the limitation period for the cause of action has expired.

[12] This case justifies, in Mr Victor Ng's view, the filing of these three originating summons by the plaintiff. All the above arguments of Mr Victor Ng, well outlined and researched, are very convincing and were put up in answer to the points raised in the defendant's affidavit in opposition that the matter between them is res judicata and that the plaintiff's present originating summons is barred by limitation.

[13] Not to be outdone, Mr KC Wong for the defendant has filed a salvo of legal issues of his own for my considerations:

(a) the court order dated 22 September 2004 in the first originating summons has barred the plaintiff from proceeding with the sale of the land;

(b) the Sarawak Limitation Ordinance, Item 97 provides for six years limitation period for the declaratory relief which are being prayed for in this present originating summons;

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(c) the vesting orders dated 23 December 1993 and 27 July 2004 respectively obtained from the High Court of Malaya in Kuala Lumpur have no application to landed properties in Sarawak;

(d) the right of the chargor and the chargee is not yet determined; and

(e) the particulars of the charge as required under O 83 of the Rules of the High Court 1980 now Rules of Court 2012 have not been complied with.

[14] Mr Victor Ng submitted that all these issues, not being raised in the defendant's affidavit in opposition means they have abandoned their pleaded case and departed from their pleadings. These issues should not, therefore, be considered by the court said he, citing *Hamit bin Matusin & Ors v Penguasa Tanah Dan Survei & Anor and another appeal* [2006] 3 MLJ 289; [2006] 2 CLJ 251 and *United Malayan Banking Corporation Berhad v Hassim bin Haji Ladis & Anor* [2001] MLJU 495; [2001] 8 CLJ 775 and a host of other cases besides that. I have, but one short answer for it. The affidavit in opposition is not categorised as a pleading but is the evidence before me, although the plaintiff's originating summons is a pleading. Therefore, in his written submission before me, Mr KC Wong can raise both factual issues as deposed in his client's affidavit in opposition or legal issues upon which the facts deposed in the affidavit evidence are based. I could not therefore take a short cut to the points raised by Mr KC Wong which have been summarised above.

THE COURT ORDER OF 22 SEPTEMBER 2004

[15] Although the order, as I mentioned earlier clearly prohibited the plaintiff from proceeding with the sale of the land, that prohibition is expressly stated as 'pursuant to the order for sale made on 7th November, 1996' and not a blanket order to prohibit the plaintiff from obtaining a subsequent order for sale, which they did anyway; on 15 August 2006 which was the second originating summons. As I said earlier, Mr Victor Ng has successfully argued that successive originating summons can be filed as long as the limitation period has not expired and that the limitation period here is 60 years which is obviously not up yet.

DECLARATORY PRAYERS AND VESTING ORDERS

[16] Other then the prayer for an order for sale of the charged property, the plaintiff sought three declaratory prayers in the present originating summons as follows:

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(a) A Declaration that the amount due and owing under Memorandum of Charge Instrument No. L. 14550/1986 registered at the Kuching Land Registry Office on 19th December, 1986 is in the following amounts as at 20th July, 2012.

(i) The sum of RM2,259,469.90 as at 20th July 2012 being the outstanding balance of the Mortgage Loan Facility; and

(ii) Agreed interest of the Mortgage Loan at the rate of 10.10% per annum on monthly rests calculated on the sum of RM587,534.21 from 21st July, 2012 until full and final settlement of the same.

(b) A Declaration that the plaintiff is the Chargee of the property described in the Schedule of Charge Property hereto (hereinafter referred to as 'the Charge Property') by virtue of the Memorandum of Charge Instrument No. L. 14550/2002 registered at the Kuching Land Registry Office on 19th December, 1986 which were entered into between the plaintiff and Edward Ngui (Deceased) (The Defendant being the Administratrix of the Estate of Edward Ngui); and

(c) A Declaration that the defendant is the Administratrix of the Estate of the Chargor, Edward Ngui (Deceased) pursuant to the Letter of Administration dated 7th February, 1990.

[17] Mr KC Wong submitted that under the said Item 97 an action for these declarations must be instituted within six years from when the cause of action arose (Item 97 is an omnibus provision — it provides a limitation period for which none is specified in the Limitation Ordinance). More than six years have lapsed since the plaintiff was vested with the rights over the charged property and when the defendant was made the administratrix of the estate of Edward Ngui. Mr Victor Ng countered that his client's action is being made in rem, not in personam. I do not however see the materiality of that distinction here and what is more, I also cannot appreciate why these declaratory prayers have to be included in the originating summons at all if the plaintiff themselves are sure of the documentary evidence in their possession that the defendant is the administratrix of the estate of Edward Ngui and that she had, in her capacity as such, transferred vide a memorandum of transfer dated 30 June 1992 the charged land to herself with the prior written consent dated 18 June 1992 of Visia Finance Bhd.

[18] Further, the plaintiff's right over the charged property is properly transmitted by the vesting order made by the two High Courts in Kuala Lumpur. The case of *Lee Hui Jian (F) v Public Bank Berhad* [2007] MLJU 46 which held that the vesting orders made by the High Court in Malaya has no application in Sarawak has been overturned by Federal Court in *Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd* [2009] 3 MLJ 745; [2009] 2 CLJ 630 which held that s 50(3) of the Banking and Finance Institution Act 1989 ('BAFIA') is all encompassing and the vesting order issued under s 50(1)

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thereof is valid throughout Malaysia regardless of the territorial jurisdiction of the two High Courts, in Malaya and in the states of Sabah and Sarawak. This, according to the Federal Court, is in view of the non-obstante term used in s 50(3) ie 'notwithstanding anything in any law or in any rule of law'.

[19] Mr KC Wong raised another point of submission. He pointed out the failure of the plaintiff to exhibit the list of properties that it acquired from Visia Finance Bhd which is in Annexture A annexed to the vesting order dated 23 December 1993, and this means there is a possibility that the charged land was not part of the assets transferred to Hong Leong Finance Bhd and thus the plaintiff. The defendant did not however challenge this fact in their affidavit in opposition and I do not think it is fair to raise it in submission now for it deprives the plaintiff of the opportunity to explain the said omission. I am convinced it is an omission given that this was not the first charged action filed by the plaintiff but the third.

THE RIGHTS OF THE CHARGEE AND CHARGOR

[20] The seeking of these declaratory prayers said Mr KC Wong, proved that the plaintiff itself is not sure of its rights and the liability of the defendant in place of the deceased chargor. As I have said just only, all the documentary evidence point clearly to the capacities of the parties and I simply do not see the need for all the declarations respecting the same but the declaratory prayer on the amount outstanding is a different matter altogether. This I will show together with my consideration of the last issue raised by Mr KC Wong.

NON-COMPLIANCE WITH O 83 OF THE RULES OF COURT 2012

[21] When this originating summons was filed in July 2012, the Rules applicable was O 83 of the Rules of the High Court 1980 ('the RHC'). With effect from 1 August 2012 the Rules of Court 2012 applies. In the affidavit in support of the originating summons, the plaintiff clearly deposed the particulars required by O 83 r 3(6) and (7) of the RHC such as the amount of advance, repayments, interest, installments in arrears and the amount remaining due but the period in which these were calculated was from 22 May 2012–20 July 2012, which date corresponds to the notice dated 26 April 2012 in which the defendant was demanded to pay the amount outstanding within seven days from the date of the demand. Subsequently, at the two previous dates of hearing of the originating summons fixed after the Rules of Court 2012 came into effect, the plaintiff filed affidavits showing the amount outstanding as at the date of hearing as required by O 83 r 3(3) read with r 3(6) of the new Rules. The declaratory prayer respecting the amount owing as at 20 July 2012 and the interest is actually superfluous since the requirements of the new Rules have been complied with. The court need only pay heed to that new Rule as it is clearly stated in it, which is O 94 r 3(2) as follows:

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All pending action and application that were commenced before the date of coming into operation of these Rules shall, from the date of coming into operations of these Rules, proceed in accordance with the provisions of these Rules.

[22] I note, however, that no affidavit was filed to show the amount outstanding as at 4 February 2012 when the originating summons was finally heard by me but that should not handicap me from granting the order for the plaintiff because I could still make the order for sale subject to the filing of that affidavit.

[23] Before I conclude there is a small matter of a notice of application filed by the plaintiff to amend a typographical error in the originating summons with regards to the registration number given to the memorandum of charge. Instead of L 14550/1986, it was stated in prayers (b), (d) and (g) of the originating summons as L 14550/2002. The defendant did not file any affidavit in opposition and neither did Mr KC Wong addressed this notice of application, fixed for hearing on the same day as the present originating summons, in his written submission. The error was clearly a typographical one and I would therefore allow it as I would the originating summons except for the declaratory prayers sought in prayer (a) to (c) and prayer (e). The order for sale as prayed in prayer (d) is given but the sale is to be by way of public tender subject to the filing of an affidavit by the plaintiff as to the amount outstanding as at 4 February 2013. For clarity I also state that prayers (f) to (i) are granted in terms with cost fixed at RM5,000.

Order allowed in part.

Reported by Afiq Mohamad Noor